

limitation on initiation of TDS proceedings. Further, if the assessee requires any documents, records, statement, etc., then it shall clearly indicate what are the documents required by it and the relevancy of the documents to their case; and upon such request of assessee, High Court directed the Revenue to furnish copies of the records required.

High Court finally directed the Revenue to pass fresh order in accordance with the law after following the principles of natural justice and further directed that no coercive action shall be initiated against the assessee till the entire exercise is completed.

already included in value charged to prospective buyers and thereby also stands included in the assessable value on which service tax liability is paid.

Facts:

Appellant entered into joint development agreement for construction of houses and residential premises with different land owners. In respect of one such agreement, appellant was required to give part of the area to land owners fully developed and entered into an agreement with prospective buyers for sale of the flats of his area. Department demanded service tax from appellant by alleging that appellant has not discharged service tax liability towards the construction services provided to the land owners towards allotted share of developed property. The demand was issued on the basis of nearest sale value of the villas, charged to the new prospective customers of the property lying with the appellant. While rebutting the same, appellant submitted that in consideration of the land given by the land owners, they constructed villas for land owner which were allotted to them free of cost. The appellant

INDIRECT TAXES



Service Tax

LD/66/192

Vasantha Green Projects
vs.
GCT

11st May, 2018

Tribunal quashed service tax demand on flats given to land owners by developer, free of cost, as value of such flats which represents consideration for securing development rights, which was

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submitted that, since the said cost is included in the price of villas and that it has paid service tax on such sale price, no further liability arises.

Held:

Hon'ble Tribunal noted that appellant has provided construction services to the land owner and as a consideration, received legal rights on his share of land. In terms of the said right, it constructed villas on that portion of land and sold them to prospective buyers. This would mean that appellant is investing the consideration received from first transaction with land owners i.e. right to construct, in the second transaction. Tribunal held that when the consideration received from land owners is invested in construction of villas to other buyers on which service tax is paid, it cannot be concluded that service tax paid on consideration received from land owners have to be evaluated differently. Further, it was noted that the construction of villas for the land owners is a consideration towards the land on which villas were constructed and offered for sale to prospective customers. The value which has been arrived at for sale of villas to prospective customers, would include the consideration paid or payable for acquisition of land. Tribunal noted that it is not a case that appellant has not discharged the service tax liability on the value received for the villas from prospective customers. Accordingly, Tribunal held that if the consideration towards the acquisition of the land has been included in the value of the villas sold to prospective customers and appropriate service tax liability has been discharged on the same value, the appellant cannot be again made liable to service tax under the premise that sale value of the villas given to land owners is a consideration on which service tax liability was not discharged, as this would lead to double taxation.

Further, Hon'ble Tribunal observed that in terms of Section 67 of Finance Act, 1994, service tax is liable to be paid on gross amount charged i.e. to say consideration received from land owners in kind and consideration received from prospective customers i.e. total gross amount. Tribunal found that the amount attributable to the consideration received by appellant in the form of land rights from the land owner stands included in the value of villas sold to prospective customer. This would mean that consideration received by the appellant in form of developmental right was considered in assessable value. Also, reliance was place on

chartered accountant certificate which clearly stated that to arrive at the value of construction, areas of villas to be shared to land owners, the appellant had undertaken an exercise to determine the value of construction per square feet for the villas and the said construction value of the villas built up area which was shared free of cost to the land owner, was considered while arriving at the service tax liability. Thus, the tribunal set aside the impugned order and the appeal was allowed in favour of the Appellant.

Excise

LD/66/193

M/s Santani Sales Organisation

vs.

CESTAT, Delhi and Others

31st May, 2018

Mandatory pre-deposit of 7.5% paid under Section 35F of CEA, 1994, at the time of appellate proceedings before Commissioner (Appeals) can be adjusted while making payment of pre-deposit of 10% for second stage appeal before tribunal.

Facts:

In terms of Section 35F of the Central Excise Act, 1994, the appellant is required to mandatory pre-deposit of 7.5% of duty and penalty in dispute, in case of first stage appeal i.e. appeal before Commissioner (Appeals) and mandatory pre-deposit of 10% in case of second stage appeal i.e. appeal before tribunal. The question of law raised in present writ petition is whether the petitioner assessee, on filing second appeal before the Tribunal is required to make an additional pre-deposit of 10% of the duty and penalty in dispute, over and above 7.5% pre-deposit paid before the Commissioner (Appeals). In other words, whether 7.5% of pre-deposit paid at first stage can be adjusted at the time of second appeal, thereby requiring payment of only balance 2.5% of disputed demand.

Held:

Hon'ble High Court noted that in terms of Section 35B(1)(a) of CEA, 1944, any person aggrieved by an order or decision of the Principal Commissioner of Central Excise or Commissioner of Central Excise as the adjudicating authority, can file an appeal before the Tribunal and such person has to pay pre-deposit of 7.5% in terms of Section 35F(ii). As per Section 35B(1)(b), appellant can file appeal before

Tribunal against an order passed by commissioner (Appeals), which is the first appellate authority in some cases. As per Section 35F(iii), where appeal is preferred against order referred in Section 35B(1) (b), appellant has to pay pre-deposit equivalent to 10% of disputed demand. High Court noted that the distinction between clause (ii) and (iii) of Section 35F is predicated on whether an appeal has been preferred against the order-in-original or against the order passed by the first appellate authority, i.e., Commissioner (Appeals). In the former case, 7.5% of the duty and penalty which is in dispute is to be pre-deposited, whereas in the latter case, 10% of the duty and penalty in dispute has to be pre-deposited. HC found that Section 35F draws distinction on the quantum of pre-deposit depending on whether the appeal is the first or the second appeal. HC also noted that in Section 35F, as the expression or words 17.5% or an additional 10% deposit have not been used instead of using mere 10% pre-deposit, the appropriateness of the meaning attached to 10% pre-deposit in the context is apparent.

Further, referring to CBEC circular no. 984/08/2014-CX dated 16.09.2014, HC held that deposits made during the pendency of the proceedings, or even after the order-in-original is passed, have to be taken into consideration for determining and deciding whether condition of pre-deposit of 7.5% or 10% has been satisfied and thus, the earlier deposits do not get obliterated and are not to be treated as inconsequential, especially in light of para 3.1 of said circular which states that any shortfall from the amount stipulated in the Section 35F shall have to be paid before filing of an appeal before the appellate authority.

Accordingly, HC held that the assessee is required to deposit 10% of the amount of duty/penalty as

confirmed by the first appellate authority inclusive of 7.5% pre-deposit made for the first appeal, because the requirement of pre-deposit of 10% would not be in addition to and over and above 7.5% of pre deposit made for the first appeal.

LD/66/194

Shiva Alloys Private Limited

vs.

Commissioner of Central Excise

07th May, 2018

Despite discharge of differential duty before passing of adjudication order, penalty under Section 11AC of Central Excise Act upheld by High Court in respect of clearance of goods without payment of excise duty.

The issue in the instant case was whether the CESTAT was right in upholding levy of 100% penalty under Section 11AC of the Excise Act, 1944 notwithstanding that the entire payment of disputed tax was paid by the appellant on or before passing of the order-in-original?

The assessee is a manufacturer of S.S. ingots and S.S. flats. Upon a search operation conducted by Central Excise Officers, shortage of goods was found on comparison with the balance shown in the books. Further an unexplained quantity of goods was found in the premises of other concerns. The Director of the assessee-company admitted that these goods found in premises other concerns belonged to it and were cleared without payment of duty. Therefore, a show cause notice was issued for payment of differential duty along with penalty. The demands and the adjudication order were affirmed by CESTAT, with certain redemption fine and personal penalty.



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Regarding the issue of this matter, it was an admitted fact that it is accepted and admitted that the appellant herein did not pay the penalty imposed under Section 11AC of the Central Excise Act. High Court noted that mere payment of differential duty would not matter once the conditions for imposition of penalty under Section 11AC were satisfied.

High Court referred to Supreme Court ruling in *Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]* wherein it was held that once the conditions mentioned in Section 11AC were fulfilled, there was no discretion left with the authority concerned to reduce the penalty to an amount less than the duty determined. High Court stated that this decision again highlighted that conditions mentioned in Section 11AC should be first fulfilled.

High Court further remarked that the payment of duty, whether made before or after issuing of show cause notice, is not determinative and a relevant factor for deciding whether or not penalty should be imposed under Section 11AC of the Excise Act. This issue is to be decided having regard to the satisfaction or non-satisfaction of the conditions stipulated in Section 11AC of the Act. The reconditions which have to be satisfied are fraud, misrepresentation, suppression of facts and contravention of the Act and Rules.

High Court observed that the assessee did not dispute or challenge the satisfaction of conditions mentioned in Section 11AC as it did not submit that fraud, misrepresentation or suppression of facts in contravention of provisions of the Act or the Rules were missing and absent.

High Court held that since the assessee had not paid 25% of the penalty within the stipulated time of 30 days and therefore, 100% penalty was payable by it.

High Court thus ruled in favour of Revenue.

LD/66/195
Commissioner of Central Excise
vs.
M/s Ceat Limited
03rd May, 2018

Bar of Unjust enrichment is not legally applicable to the provisional assessment cases before amendment to Rule 9B.

The assessee being a manufacturer of tyres had cleared the goods under provisional assessment for the Financial Year 1998-1999 and the same

was finalised vide order dated 04.06.2001 and the duty paid in excess was determined at ₹91.59 lakh. Consequently, the Assistant Commissioner had refunded the claim of assessee on such finalisation of provisional assessment. The Commissioner ruled in favour of Revenue and held that assessee had incorrectly claimed deductions on the assessable value; however CESTAT ruled in favour of assessee and set aside this order of the Commissioner, thereby holding that refund relating to the deduction was permissible to the assessee.

The Assistant Commissioner also observed that in the year 1998-99 the assessment was made provisional as the assessee claimed various discounts from sale price as actual discount was not known to them at the time of the clearance. In July 2003, Revenue issued a show cause notice to the assessee asking why the amount of ₹91.59 lakh, erroneously refunded to them, should not be recovered from them under the provisions of Section 11A(1). The said show cause notice was issued on the basis that assessee was not entitled for refund and the same should have been credited to the consumer Welfare Fund as laid down under the provisions of Section 11B(2) and as the assessee has not produced any evidence to prove that they have not passed on the burden of the duty to their customers during the relevant period.

The Commissioner held that as far as the issue of unjust enrichment is concerned the provisions under Rule 9B(5) of Central Excise Rules, 1944 were made applicable with effect from 26.06.1999 and the said amendment is to be made applicable prospectively. It was therefore, held that for the period in question i.e. 1998-99, the said amendment would not be applicable. CESTAT also ruled in favour of the assessee.

High Court observed that as per Rule 9B(5), upon final assessment of duty, the provisionally assessed duty would be adjusted there against, and if the same fell short of or was in excess of duty finally assessed, the assessee would pay the deficiency or be entitled to a refund, as the case may be. As per the proviso that was appended thereto w.e.f. June 26, 1999, if an assessee was entitled to refund, same shall not be made except in accordance with the procedure established under Section 11B(2) of the Act.

High Court observed that the event of payment of excise duty was not completed till the finalisation of the assessment, because it would only be thereafter

that the question of recovery of duty short paid or refund of excess duty would arise. High Court held that the Commissioner was perfectly justified in recording a finding that the said show cause notice as not at all sustainable and that the issue of unjust enrichment was not applicable for the reason that the goods were assessed on provisional basis and the refund claimed was after finalisation, as per Rule 9B(5) of the Central Excise Rules.

High Court referred to Supreme Court judgement in *CCE vs. Allied Photographics India Ltd, Mafatlal Industries Ltd [1997 (89) ELT 247]* and *Commissioner of C. Ex. Bangalore-II vs. ITC Ltd.*, and observed that entitlement to refund and finalisation of assessment under Rule 9B was independent from the provisions of refund under Section 11B. Even if the amendment made by Notification No. 45/99 w.e.f. June 25, 1999 was noted, only the procedure established under Section 11B(2) had been made applicable to the refund arising out of the finalisation. High Court observed that the doctrine of unjust enrichment would not be attracted to the refunds from finalisation of provisional assessment for the period prior to 1999. The proviso to Rule 9B(5) would be applicable only w.e.f. June 25, 1999 and hence, unjust enrichment will not apply even if assessments were finalised after the said date.

High Court held that the CESTAT order did not suffer from any perversity and thus ruled in favour of assessee.

Customs

LD/66/196

Commissioner of Customs

vs.

Arif Khichi

23rd May, 2018

CESTAT was not justified in setting aside adjudication order and would have to decide the issue on merits including question of DRI's jurisdiction without being influenced by High Court decision or without awaiting Supreme Court judgement.

The issue before Delhi High Court was whether CESTAT was justified in remanding the matter to the Adjudicating Authority to decide the issue of jurisdiction of DRI to issue show cause notice, after the decision of the Supreme Court against the ruling of High Court's Division Bench in *Mangali Impex Limited vs. Union of India*.

Show cause notices had been issued by Additional Director General, DRI to the assesseees and thereupon, adjudication orders were passed by the Principal Commissioner of Customs (Import), Inland Container Depot., New Delhi. These original adjudication orders were challenged and set aside by the Customs, Excise and Service Tax Appellate Tribunal ('Tribunal' for short) in view of its earlier decision in Final order No.53941-53942/2017, Doaba Stud & Agriculture Farm versus Commissioner of Customs (I&G) decided on 12th June, 2017.

High Court referred to Supreme Court ruling in case of *Commissioner of Customs vs. Sayed Ali [2011 (265) ELT 19 (SC)]*, wherein it was held that DRI were not proper officers under Section 2(34) of the Customs Act, 1962. Post this judgement, a notification no. 44/2011- CUS (NT) dated 6th July, 2011 was issued by the CBEC, assigning functions to various officers including Additional Director General, DRI for the purposes of Section 28 of the Customs Act. Thereafter, sub-Section (11) was inserted under Section 28 of the Customs Act vide the Customs (Amendment and Validation) Act, 2011 with effect from 16th September, 2011, assigning the function of proper officers to various DRI officers with retrospective effect. However, Division Bench of Delhi High Court in the case of *Mangali Impex Ltd.* had held that the newly inserted sub-Section 11 to Section 28 of the Customs Act would not empower the officers of DRI or the DGCEI to issue show cause notice for the period prior to 8th April, 2011 i.e.; period prior to the date on which the Finance Act, 2011 had received assent of the President. However, High Court noted this decision had been stayed by the Supreme Court vide its order dated October 7, 2016.

High Court further referred to *Bombay High Court ruling in Sunil Gupta vs. Union of India [2015 (315) ELT 167]* and *Telangana and Andhra Pradesh High Court ruling in Vuppalamritha Magnetic Components Ltd. vs. DRI (Zonal Unit) Chennai [2017 (345) ELT 161 (AP)]* where these courts had taken a contrary view to the one expressed by the Division Bench.

High Court observed that CESTAT was not justified in setting aside the order-in-original to await the decision of Supreme Court in *Mangali Impex Ltd*, instead of deciding the said issue on merits. High Court observed that once an order-in-original is set aside, it would mean that the entire adjudication proceedings may have to be

undergone again and this would cause harassment to the assessee as well as inconvenience to the department.

High Court stated that in several orders, it had given an option to the CESTAT to decide the issue on merits including the question of jurisdiction of the officer of DRI to issue show cause notice without being influenced by the decision of the Delhi High Court in the Mangali Impex (*supra*) or without awaiting the judgement of the Supreme Court.

High Court thus ruled in favour of Revenue and remanded the matter to CESTAT, without passing any order on merits.

Transfer pricing

LD/66/197

M/s Kaypee Electronics & Associates Pvt. Ltd.

vs.

Dy. Commissioner of Income Tax

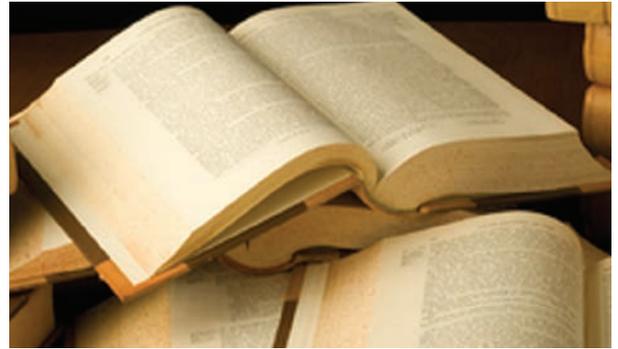
29th May, 2018

ITAT erred in upholding royalty adjustment although royalty payment formed a part of the operating cost under entity level TNMM.

Assessee is a company engaged in the business of manufacturing magnetic based electronic coils, transformers and inductors. It is a subsidiary of Falco Limited, Hong Kong (AE) and had entered into a technology collaboration agreement dated 29/03/2006 with its AE for manufacturing electronic components by using technology, enterprise and know-how of Falco, marketing, selling the same under the Brand name of Falco, in India and abroad.

The assessee was required to pay royalty at 8% to the AE in terms of the agreement and accordingly the assessee had made a payment of royalty of ₹ 4.39 crores as per its declaration in Form 3CEB. Transfer Pricing Office (TPO) determined the arm's length price in respect of royalty at ₹ 2.75 crore holding that payment of Royalty at 8% on sales was not justified as there was no value addition made by the AE. DRP also confirmed the adjustment.

ITAT while rejecting the contention that when Transactional Net Margin Method (TNMM) was applied at the entity level, there was no necessity for benchmarking in respect of royalty transactions, observed, "on mere perusal of order of the Ld. TPO it is manifest that the TPO had picked up the transaction royalty alone for the purpose of benchmarking". ITAT dismissed assessee's appeal while rejecting the ground of appeal raised by the assessee as regards assailing of the addition of ALP



adjustment on account of royalty payment with respect to the concerned AYs in question. Aggrieved, assessee preferred an appeal before the Karnataka High Court.

Before the High Court, assessee also argued that ITAT had disposed of the appeals by recording a finding only as regards the issue of royalty and its adjustment by the TPO, and there was no occasion to advance arguments as regards the other issues adverted to in their memorandum of appeal. Further, assessee submitted that the question regarding the necessity of separate benchmarking in respect of royalty payment when the TPO had accepted the TNMM at the entity level was covered by the decision of Sony Ericsson Mobile Communications India Pvt. Ltd and the decision of the co-ordinate Bench of this court in the case *Siemens VDO Automotive Ltd. [(TP) A No. 923/B/2012]*, wherein it was held that as the royalty paid was already forming part of operating cost, there was no necessity of separately benchmarking royalty.

High Court observed that there was strength in the assertion of the assessee regarding non-hearing on the grounds raised in the memorandum of appeal referred above. High Court observed that assessee's question regarding ITAT's upholding the royalty adjustment although such royalty formed part of operating cost under enterprise level TNMM, was decided without discussing the applicability or otherwise of the Delhi High Court ruling in the case of *Sony Ericsson Mobile Communications India Pvt. Ltd.*, and the decision of the Co-ordinate Bench of the Tribunal in the case *Siemens VDO Automotive Ltd.*

Thus, ruling in favour of assessee, High Court observed that ITAT erred in law in failing to adjudicate various other grounds raised by the assessee. Thus, High Court remanded the issue back to ITAT directing to hear the appeals afresh on all grounds urged in the memorandum of appeal.